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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 240

THE KENILWORTH COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims appears at pages 37 to 42, inclusive, of the record, and is reported in 59 Ct. Clms. 156.

JURISDICTION

The judgment to be reviewed was entered January 21, 1924 (R. 16, 43). On March 21 a motion for new trial was seasonably made and entertained, and on May 12, 1924, was overruled (R. 43). Petition for appeal was filed August 9, 1924 (R. 43), under Section 242 of the Judicial Code, as it existed prior to the Act of February 13, 1925.

THE QUESTIONS INVOLVED

The appellant seeks to recover damages for the alleged breach of a restrictive covenant contained in a lease with the War Department. The questions raised by this appeal are whether the Court of Claims correctly decided (1) that the War Department did not violate the restrictive covenant and (2) that in any event the appellant failed to prove either that it had been damaged or the extent to which it had been damaged by the alleged breach. Both are questions of fact, and it is difficult to discover any question of law which is raised by this appeal, except, possibly, the question of the proper construction of the restrictive covenant.

The appellant's statement of facts is not satisfactory. Not only has the appellant gone outside the record to give its version of the evidence, but it has failed to state essential facts found by the Court of Claims, and has incorrectly stated other essential facts found by that court. The Government therefore finds it necessary to state the facts rather fully.

STATEMENT OF FACTS

On December 11, 1917, the appellant was the owner of a tract of land near Asheville, North Carolina, on which it had a large hotel under construction (R. 17). On that day it offered to lease the property to the War Department as a hospital for disabled soldiers, for a term to continue until a year after the signing of a treaty of peace (R. 25).

The appellant stipulated that the lease should provide that no part of the property should be used " for the purpose of *treating or housing* any person suffering from tuberculosis in any form, or from smallpox or any other *like* contagious or obnoxious disease, *provided, however*, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation *or the like* " (R. 26). (Italics ours.)

However, the War Department objected to the wording of the proposed restriction (R. 17, 29), and the appellant accordingly revised its offer by substituting for the words " for the purpose of treating or housing " the words " for the purpose of *receiving for treatment*," with the result that the restrictive covenant finally embodied in the lease, dated January 21, 1918, between the appellant and the War Department, took the following form (R. 19):

> That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of *receiving for treatment* any person suffering from tuberculosis in any form, or from smallpox or any other *like* contagious or obnoxious disease, *provided, however*, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation *or the like*. (Italics ours.)

The lease also obligated the War Department to surrender all buildings, equipment, and machinery "in as good condition and repair as when leased, usual wear and tear and acts of God excepted" (R. 19).

The term of the lease was to begin on February 1, 1918, and to end on June 30, 1918 (R. 19), but the lease was twice renewed. The Medical Corps of the Army occupied the hotel as a hospital for nineteen months, from April 9, 1918, when it was finally completed (R. 19), until November 8, 1919, when the second renewal lease was canceled by mutual consent under the circumstances hereinafter narrated (R. 20; *infra*, p. 6).

During the War Department's occupancy of the hotel, the appellant made repeated protests against the housing and treatment of tubercular and syphilitic patients (R. 23), and on August 2, 1921, presented a petition to the Secretary of War asking (1) for damages to the hotel in the sum of $158,721.32, and (2) for damages resulting from alleged breaches of the restrictive covenant in the sum of $500,000 (R. 23). On October 26, 1921, the War Department Claims Board awarded the appellant $70,359.54 in full settlement "*of all present and future claims for damages to said hotel property growing out of its use by the War Department,*" and rejected the appellant's second claim without prejudice (R. 24). On October 27, 1921, the appellant received the sum of $70,359.54 as payment in full for all damages to its hotel building (R. 24).

The appellant subsequently began this action (R. 1), in which it alleged (R. 4) that in violation of the restrictive covenant above set forth, the War Department "received and housed for prolonged treatment in said building a great number of persons suffering from tuberculosis and contagious and obnoxious diseases, and kept and maintained said persons in said building in large numbers and for prolonged periods * * *," and (R. 5) "housed and treated in said building a large number of German interned prisoners, who were at the time suffering with a malignant type of typhoid fever * * *."

The appellant further alleged that as a result, the reputation of its hotel as a tuberculosis hospital "was during the years 1918 and 1919 firmly established with the traveling and pleasure-seeking public," and that "by reason of said damage to its reputation, the rental value of said property now is, and for the five years following after December 31, 1922, will be $80,000 per annum less than it would have been but for such injury" (R. 7). The appellant also alleged that the cost of restoring the hotel to the condition in which the War Department received it "by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing and equipment, would have been $325,000" (R. 7). By some mathematical process which we do not understand the appellant

fixed its total damage first at $600,000 (R. 8) and subsequently, by amendment, at $865,000 (R. 16).

The significance of the appellant's selection of December 31, 1922, as the date from which to reckon its alleged loss resulting from the diminished rental value of its hotel, is to be found in the circumstances under which the War Department's lease was terminated. On November 1, 1919, while the War Department's lease was still in force, the appellant proposed to the Secretary of the Treasury to lease the hotel and certain other property to the Government for hospital purposes for a term of five years from November 8, 1919 (R. 20), and on that day the War Department transferred the property to the Public Health Service of the Treasury (R. 20). On November 19, 1919, the appellant and the Treasury Department entered into a lease in accordance with the appellant's proposal of November 1, 1919. *Neither the proposal nor the lease contained any restriction whatsoever against the use of the hotel for the treatment of tubercular patients or those suffering from other contagious or obnoxious diseases* (R. 21). The Public Health Service used the property for hospital purposes for more than three years, from November 8, 1919, until December 31, 1922 (R. 24), when the Treasury Department's lease was canceled by mutual consent, *and during that period patients suffering from pulmonary tuberculosis were housed and treated in the hotel* (R. 21). Upon the termination of the Treasury Department's lease,

the appellant proceeded to furnish and equip the hotel at a cost of $161,875.21, and on March 10, 1923, opened it for the reception of guests (R. 24). The appellant went to no expense as far as appears from the record for "fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing, and equipment."

The findings of the Court of Claims make it perfectly clear that the War Department did not violate the restrictive covenant but, on the contrary, scrupulously observed its obligations thereunder.

During the nineteen months of the War Department's occupancy of the hotel as a hospital, the Medical Department kept certain records at the hospital, known as "Disease Index, Medical Cards," there being a card for each patient admitted to the hospital. These cards were evidently made up at the time the patient was admitted to the hospital and largely on the basis of information furnished by him. On one hundred and nineteen of those cards appears the word "tuberculosis." (R. 21.) *However, none of those patients was received for the treatment of tuberculosis.* (R. 21.) Sixty of them were discovered after observation and diagnosis to be free from tuberculosis, and the others were received for operations, or for the treament of other diseases, or for both purposes, or for observation. As soon as practicable those who were in fact suffering from tuberculosis were transferred to a tuberculosis hos-

pital. It was neither the purpose nor the practice of the War Department to house tubercular patients in the hospital except temporarily. (R. 21.)

The War Department maintained a venereal ward in the hospital and fifty-five cases of suspected syphilis or gonorrhea are recorded as having been admitted to the hospital during the period of the War Department's occupancy. However, of these patients, nineteen were discovered on diagnosis to have no venereal disease; fifteen required an operation or the treatment of a concomitant disease; and three were admitted for other diseases and developed venereal diseases thereafter. (R. 22.) Of the entire fifty-five cases only seventeen showed venereal conditions not requiring operations and not accompanied by other diseases. Of these seventeen cases, seven were members of the hospital organization. Of the remaining ten cases, three were from a labor organization working in a near-by forest, who walked from their place of work to the hospital; four became ill near the hospital and presented themselvese for treatment, and three were transferred to the hospital without authority under the War Department's regulations. The patients afflicted with venereal diseases were coming to and from the hospital all the time. (R. 22.)

In the latter part of the summer of 1918, one hundred and ninety interned Germans, suffering from typhoid fever in an acute stage, were transferred to the hospital. Four of them died en route

and seven of them after their admission to the hospital (R. 22).

No violations of the lease in other respects are charged.

After hearing medical testimony, the Court of Claims found (R. 22, 23):

> 1. That typhoid is not contagious and that the average case of typhoid is not obnoxious. (There is nothing in the record to indicate that the typhoid cases admitted to the hospital were not average cases. As a matter of fact the indications are that they were, since only eleven of the one hundred and ninety cases terminated fatally.)
>
> 2. That syphilis is contagious, but as a practical matter may be communicated only by sexual intercourse, and that it is not obnoxious except in its secondary and tertiary stages. (The record does not disclose that any of the syphilitic cases had advanced beyond the primary stage. If it had been proved that they had, it is inconceivable that the Court of Claims would not have so found. In effect it found to the contrary by finding that the treatment of the syphilitic patients did not constitute a breach of the restrictive covenant.)
>
> 3. That smallpox is the most contagious of diseases, except measles, and may be communicated at a distance of several feet; that it is also an obnoxious disease and that during the pustular stage it is a revolting sight, disagreeable to the eye, to the sense of smell and most objectionable in every way.

4. That the organisms of syphilis and typhoid, unlike those of tuberculosis, die very quickly and leave no traces on floors or walls.

5. That neither syphilis nor typhoid is contagious like smallpox or tuberculosis.

The Court of Claims also found (R. 23) that the rental value of the appellant's hotel as a hotel would have been diminished $50,000 per annum by its occupancy by the War Department as a general hospital, even though all patients with tuberculosis and other contagious or obnoxious diseases had been excluded therefrom, and that what further reduction, if any, in rental value was caused by the housing and treatment of the patients suffering with tuberculosis, typhoid or venereal diseases did not satisfactorily appear from the evidence.

THE APPELLANT'S MOTION TO REMAND

The appellant apparently recognizes that it has no chance to succeed upon this appeal in view of the facts as found by the Court of Claims. It admits that "if the view, or views, which the Court of Claims takes of the administration of the Kenilworth hospital were correct and sufficiently comprehensive, appellant obviously would have little room to say its rights were invaded." (Brief, p. 14.) The appellant has therefore moved this Court to remand the case for not less than seventeen further findings. The motion to remand has as little merit as the appeal. It is based upon the contention that the Court of Claims failed to find "important facts" and that other findings are without supporting evidence (Appts. motion, p. 1). However,

in neither respect has the appellant's contention any foundation in the record, and this Court will not go beyond the record to determine whether a case should be remanded for further findings of fact. *United States* v. *Anciens Etablissements*, 224 U. S. 309; *United States* v. *Driscoll*, 131 U. S. CLIX; *United States* v. *New York Indians*, 173 U. S. 464. There is nothing in this case to take it out of the general rule that the findings of the Court of Claims are conclusive upon this Court. As this Court said in *Rogers* v. *United States* (decided March 1, 1926):

> Much of the briefs of counsel for the plaintiff in error is made up of statements based on and quotations from the evidence before the Court of Claims. We can not consider this. We are limited to the findings of the Court of Claims.

A brief consideration of the further findings which the appellant desires will show that the motion to remand is entirely without merit. In many instances the appellant seeks, not ultimate facts, but evidence, and often immaterial evidence. (See requests 1, 2, 3, 4, 5, 7, 10, 11, and 17.) In the instances in which the appellant asks for findings of fact the facts are either entirely irrelevant (see requests 9, 12, 14, and 15) or are fully covered by the findings contained in the record. (Compare the second, sixth, and ninth requests with the fifth sixth, and seventh findings of fact [R. 21, 22], the fifth request with the eleventh finding of fact [R. 23], the tenth request with the fourteenth find-

ing of fact [R. 24, 25], and the seventh, thirteenth, and sixteenth requests with the ninth finding of fact [R. 23]. As far as the eleventh request is concerned, the Court of Claims has said that " there is nothing in the record to show that any (guests) have departed or others failed to come because of the previous use of the building as a hospital." (R. 41.)

If further proof of the frivolous character of the appellant's motion to remand is necessary, it is to be found in the appendices thereto, the purpose of which is to show this Court " the probability that the matters here indicated can be proved " (Appts. motion, p. 4). Thus, in its first request for further findings, the appellant asks for evidence, namely, the full correspondence or other negotiations between the Office of the Surgeon General and the appellant leading up to the final agreement upon the wording of the restrictive covenant (Appts. motion, p. 2). Appendix A (Appts. motion, pp. 7–14) is supposed to support that request, but Appendix A consists of certain correspondence, every bit of which is now included in the record (pp. 26, 27, 29).

The real purpose of appellant's motion is not to obtain additional findings of ultimate facts, but to obtain a new trial. That is disclosed by the fact that the appellant seeks an opportunity to introduce further evidence in the event the case is remanded for further findings (Appts. motion, p. 5).

SUMMARY OF ARGUMENT

I. The War Department did not violate the restrictive covenant.

II. The appellant failed to establish either that it had been damaged or the extent to which it had been damaged by the alleged breach of the restrictive covenant.

ARGUMENT

I

THE WAR DEPARTMENT DID NOT VIOLATE THE RESTRICTIVE COVENANT

The extent to which the lease restricted the War Department's right to use the hotel as a hospital is made perfectly clear when the language of the restrictive covenant (*supra*, p. 3) is considered in the light of the negotiations preceding the execution of the lease. The appellant first proposed that the lease should prohibit the *treatment or housing* of patients with tuberculosis, smallpox, or *like* contagious or obnoxious diseases, except that they might be housed in the hospital temporarily for an operation *or the like* (R. 17). But the War Department was unwilling to put itself in a position in which it might have to violate either the obligations of its contract or the obligations of humanity.

It realized that however careful it might be, patients suffering from the prohibited diseases might gain admission to the hospital. It realized that patients admitted to the hospital for other diseases might subsequently develop one of the pro-

hibited diseases. It knew that in either of those contingencies it might be necessary to house and treat patients with the prohibited diseases until they could be removed to another hospital. It realized that if a patient with one of the prohibited diseases was admitted for the surgical or medical treatment of a concurrent disease, as he might properly be admitted under the appellant's proposal, which provided for their admission " for an operation *or the like*," the War Department could not fail simultaneously to treat the prohibited disease. It realized that it would do little good to amputate a tubercular patient's leg to save him from death from gangrene only to permit him to die from tuberculosis.

The War Department was therefore unwilling to assume an absolute obligation *not to treat or house* patients with the prohibited diseases, except temporarily and for other diseases. The War Department therefore insisted or, as the appellant would have it (Appts. brief, p. 5), " suggested " that the proposed restrictive covenant should be modified so as to impose upon it only the obligation not to receive persons with the prohibited diseases for the treatment of those diseases (R. 18). In spite of the appellant's argument to the contrary (Brief, p. 12), there was obviously a radical difference between the appellant's proposal and the War Department's counter proposal, and the appellant agreed to modify the restrictive covenant

in accordance with the War Department's wishes. The resulting obligation is clear. The War Department agreed in effect (1) that it would not receive a patient with one of the prohibited diseases, solely for the purpose of treating the prohibited disease, and (2) that having received a patient with one of the prohibited diseases for the surgical or medical treatment of a concurrent disease, or for observation, it would keep him in the hospital no longer than reasonably necessary for that purpose. The Court of Claims correctly construed the restrictive covenant (R. 41):

> What do the words "receiving for treatment" mean? It is not asserted that they import absolute exclusion. Their ordinary and usual meaning indicate a clear intent to impose upon the defendant the positive obligation to refrain from knowingly receiving a patient within the restricted class and thereafter treating him for the disease. In other words, in so far as it was possible, by every known medical means, the defendant would not receive for treatment a patient known at the time to fall within the restriction. Manifestly, though such a patient might be received temporarily, he could not be immediately and ruthlessly cast aside, and if immediately thereafter he was transferred to a regular tubercular hospital for treatment, no promises were broken.

It is obvious that the appellant has not correctly stated (Brief, p. 18) the construction placed upon the restrictive covenant by the Court of Claims.

The War Department did not violate the restrictive covenant. No tubercular patient was admitted to the hospital except for the surgical or medical treatment of other diseases or for observation. The restrictive covenant permitted their admission for such purposes. As soon as practicable they were transferred to a tubercular hospital. It was neither the purpose nor the practice of the War Department to house tubercular patients in the hospital, except temporarily.

While all of the typhoid patients and seventeen of the venereal patients were admitted to the hospital solely for the treatment of those diseases, that was not a breach of the restrictive covenant for the simple reason that the restrictive covenant had no application to any disease except tuberculosis or smallpox and *similar* contagious or obnoxious diseases. The Court of Claims has found that neither typhoid nor syphilis falls within that category. A finding with respect to the similarity between diseases, like findings with respect to the reasonableness of compensation or of delays, or with respect to the suitability of a building for the purposes for which it was intended, is a finding of fact conclusive upon this Court. *Robinson* v. *United States*, 261 U. S. 486; *Cramp* v. *United States*, 239 U. S. 221; *United States* v. *Anciens Etablissements, supra; Union Pacific Railway Company* v. *United States*, 116 U. S. 154; *Hathaway & Company* v. *United States*, 249 U. S. 460; *United States* v. *Omaha Indians*, 253 U. S. 275.

The appellant admits (Brief, p. 17) that under the restrictive covenant the War Department had the right to treat tubercular and syphilitic patients surgically, but argues that it had no right to take them into the hospital for the medical treatment or observation of a concurrent disease (Brief, p. 15). The appellant ignores the fact that the restrictive covenant provided that such patients might be housed temporarily for an operation *or the like*. Obviously, the purpose of this provision was to enable the War Department to afford general hospital facilities, not available in hospitals used exclusively for the treatment of the prohibited diseases, to patients suffering from such diseases.

The appellant complains that the Court of Claims did not find whether any of the syphilitic cases had advanced to the tertiary stage and argues that if any of them had advanced to that stage the restrictive covenant was violated (Brief, p. 18). That, of course, is a *non sequitur*. Assuming that the admission to the hospital of a patient with syphilis in the tertiary stage *solely* for the purpose of treating that disease, was prohibited by the restrictive covenant, even the appellant admits, as we have pointed out, that such a patient might have been admitted for the surgical treatment of a concurrent disease. Furthermore, the appellant alleges that its damages resulted from the fact that its hotel acquired the reputation of a tuberculosis hospital because of the use made of it by the War Department. Obvi-

ously, the hotel could not have acquired such a reputation as the result of the treatment of any number of syphilitic cases, even were they all in the tertiary stage. Besides, as we will point out later, the appellant did not prove what damage, if any, it suffered because of the treatment of the syphilitic cases. We may apply to the appellant's contention in this respect the language used by this Court with respect to the contentions of the appellant in *Tower Cotton Mills, Inc.*, v. *United States* (decided March 1, 1926):

> It is unnecessary for us to consider these contentions; for there are no findings by the Court of Claims that appellant suffered any loss or damage * * *.

II

THE APPELLANT FAILED TO ESTABLISH EITHER THAT IT HAD BEEN DAMAGED OR THE EXTENT TO WHICH IT HAD BEEN DAMAGED BY THE ALLEGED BREACH BY THE WAR DEPARTMENT OF THE RESTRICTIVE COVENANT

The appellant not only failed to prove a breach of the restrictive covenant, but also failed to prove that it suffered any damage as a proximate result. The appellant alleged that because of the treatment by the War Department of persons suffering from tuberculosis and other contagious or obnoxious diseases the rental value of the property for the five years succeeding December 31, 1922 (the date when the Public Health Service ceased to occupy the hotel for hospital purposes), " will be $80,000 per annum less than it would have been but

for such injury," and that the cost of restoring the property to the condition in which the War Department received it "by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing, and equipment, would have been $325,000." (R. 7.)

The appellant argues (Brief, p. 3) that the expenditure of $325,000 was necessary "to clear away all seeds" of the prohibited diseases remaining in the hospital on December 31, 1922. However, the hotel was opened to the public without any such expenditure, which is rather conclusive proof that no such expenditure was in fact necessary. Furthermore, since the Treasury Department's lease did not limit the diseases which might be treated during the Public Health Service's occupancy of the hotel, the Government is obviously not chargeable with the cost of disinfecting against germs which were introduced into the hotel after November 8, 1919, when the War Department ceased to occupy the property and the Public Health Service took it over. On any theory the Government is chargable only with the expense of disinfecting against bacteria which took up their sojourn in the hotel prior to November 8, 1919. The appellant therefore endows bacteria with long lives. As this Court said in *Weaver* v. *The Palmer Brothers Company* (decided March 8, 1926: "* * * bacteria perish rapidly when separated from human or animal organisms * * *." Furthermore, it might be rather diffi-

cult, as a practical matter, even for the "competent architect" to whom the appellant refers (Brief, p. 19), to tell which of the germs remaining in the hotel on December 31, 1922, had been there since November 8, 1919, or what part of the expenditure of $325,000 was necessitated by those germs and what part by the germs which for more than three years the Public Health Service was permitted to bring into the hotel.

However, as far as this item of alleged damage is concerned, it is necessary to say only that on October 27, 1921, the appellant was paid and accepted $70,359.54 "as full, final and complete satisfaction of all present and future claims for damages to said hotel property, growing out of its use by the War Department" (R. 23, 24). The settlement was not confined, as the appellant contends (Brief, p. 16), to "breakage or like deterioration." The settlement has therefore left open only the claim that by reason of the alleged breach of the restrictive covenant, the rental value of the hotel was diminished for a period of five years succeeding December 31, 1922.

As to that, the Court of Claims has found that the occupancy of the hotel as a hospital by the War Department, although all persons with tuberculosis and other contagious or obnoxious diseases had been excluded therefrom, would have reduced its rental value as a hotel $50,000 per annum, and that the appellant did not prove "what further reduction, if any, in rental value

was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases * * *" (R. 23). That finding is conclusive. As this Court said in *United States* v. *Smith*, 94 U. S. 214, 219:

> In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proved. The court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect.

A brief consideration of the facts will show that the Court of Claims was obviously right in its finding that the appellant failed to prove its damages.

The city of Asheville is attractive to two classes of persons—those seeking rest and recreation and those seeking a cure from tuberculosis. Experience has shown the necessity of segregating the two classes in order to prevent serious impairment of the city's reputation as a pleasure resort. The city has therefore adopted stringent laws and regulations to insure the complete isolation of persons with tuberculosis from the rest of its inhabitants, permanent and temporary (R. 38). If a building is let for the use of tubercular persons, its value for other purposes may be seriously impaired (R. 38). This is especially true of a hotel of the character of the appellant's, which is alleged (R. 2) to have

been " designed and constructed solely for the entertainment of persons, having ample means, who traveled and patronized hotels of the best class, for pleasure and luxurious living."

The appellant was fully aware of all this. The appellant knew that tourists, for sentimental reasons, might hesitate to stay at its hotel with knowledge that it had been used as a hospital for tubercular patients. (R. 18.) And yet under the terms of the appellant's original proposal to lease its property to the War Department as a hospital, persons with tuberculosis were permitted to be housed therein temporarily for an operation or the like (R. 17), and by the terms of the restrictive covenant as finally agreed upon, the War Department had even greater freedom in the treatment of tubercular patients (*supra*, p. 14). The War Department did not seek the lease. As the Court of Claims points out (R. 39), it was the appellant's voluntary act which changed the hotel into a hospital, thereby impairing its rental value as a hotel at least $50,000 a year, without regard to the kind of diseases to be treated therein. The reason for the appellant's conduct is not far to seek or difficult to find.

In December, 1917, the duration of the war was uncertain. The appellant undoubtedly shared the common belief that it would last for several years. The appellant undoubtedly believed that the possibility of profit in war times from so nonessential an enterprise as its hotel was highly specu-

lative, to say the least. The appellant much preferred the certain profit which would result from leasing a hotel that had cost $815,000 and in which its investment was only $105,000 (R. 17), at $115,000 for the first year and at $75,000 for subsequent years. (R. 28.) The conclusion is irresistible that the appellant's desire for present gain was far greater than its fear of future loss. It should not now be permitted to saddle on the Government a loss of which it deliberately took the risk.

The appellant's complaint is that its hotel acquired the reputation of a tuberculosis hospital as the result of its occupancy by the War Department. (R. 7.) The Court of Claims did not so find. However, it might well have acquired such a reputation had no tubercular patients been admitted to the hospital, for the terms of the restrictive covenant could hardly have been expected to become a matter of common knowledge. It might well have acquired such a reputation since the War Department had the right to house and treat persons with tuberculosis, provided only that it did not take them in for that purpose alone. The appellant's hotel might well have become known as a tuberculosis hospital as the result of the admission thereto of the fifty-nine tubercular patients to whose admission the appellant consented in advance. The hotel could hardly become known as a tuberculosis hospital as the result of the admission thereto of the typhoid and venereal patients.

The situation disclosed by the record is therefore this: The rental value of the hotel would have been diminished $50,000 a year solely by its use as a hospital and without regard to the character of the diseases treated therein. To what extent, if any, its rental value was further diminished by the fact that in nineteen months fifty-nine tubercular patients, one hundred and eighty-six typhoid patients and thirty-six patients with venereal diseases were treated in the hospital, does not appear. Nor does it appear to what extent such further diminution in rental value, if any, is to be attributed to the fifty-nine tubercular patients and to the nineteen patients with venereal diseases who were suffering with concurrent diseases, and to what extent to the one hundred and eighty-six typhoid patients and to the seventeen patients with venereal diseases who had no concurrent diseases.

That is not all. If the War Department caused the appellant damage, the appellant made no effort at mitigation. On the contrary, upon the termination of the War Department's lease and on November 8, 1919, the appellant leased the property to the Treasury Department for five years for hospital purposes (R. 20). The lease contained no restriction whatever upon the use of the hotel for the treatment of tubercular or smallpox patients or patients with other contagious or obnoxious diseases. The Public Health Service used the property as a hospital from November 18, 1919, to December 31, 1922 (R. 24), and during that period

patients suffering from pulmonary tuberculosis were housed and treated therein (R. 21). Undoubtedly this was not without its effect upon the reputation of appellant's hotel, but to what extent its diminished rental value is to be attributed to the War Department's use of the premises, and to what extent to the Public Health Service's, does not appear, and obviously was not susceptible of proof.

But even that is not all. When the appellant's hotel was first leased to the Government for hospital purposes, it was in an unfinished condition. It had never been used as a hotel. It was a new, untried, and highly speculative enterprise. There is nothing in the record to indicate its rental value as a hotel at any time, either in January, 1918, when it was rented to the War Department, or in November, 1919, when it was rented to the Treasury Department, or on December 31, 1922, when the Government ceased to occupy the property, or thereafter. As the Court of Claims said (R. 40):

> If, then, the plaintiff company, for a period of practically five years, demised its premises for use as a hospital, part of the time with a limited restrictive clause, and for much the greater portion of the time without any restriction, how may we estimate with any degree of certainty an alleged damage to its reputation or use as an inn, when, as a matter of fact, it had never attained any reputation or been used as such.

It appears from the record only that after expending $161,875.21 for furnishings and equipment, and nothing for disinfection, the appellant opened its hotel to the public on March 10, 1923 (R. 24), and that to June 1, 1923, its operating loss was only $9,741.72, after allowing for rent at the same rate paid by the Treasury Department, namely, $70,000 per annum (R. 25). As the Court of Claims points out (R. 41), this result in the beginning of the enterprise was by no means discouraging, especially since the hotel business in Asheville during that period was generally bad (R. 25), and the property had been used for hospital purposes for almost five years. The facts hardly bear out the appellant's claim of a loss in rental value from December 31, 1922, of $108,000 a year, $33,000 more than the rent which it received from the War Department except during the first year of the War Department's lease (R. 19) and $38,000 more than the rent which it received from the Treasury Department (R. 23), although the necessities of the Government undoubtedly caused it to pay a high rental for the property.

Furthermore, there are other facts disclosed by the record which make extremely questionable the appellant's claim that the reputation of its hotel was seriously impaired. It is significant that when the appellant opened its hotel to the public, the room which the War Department had used as the venereal ward was converted into a ladies' parlor. (R. 25.) The appellant could hardly have

thought at that time that the maintenance of the venereal ward had become widely known. It is significant, also, that during the period from March 10, 1923, to June 1, 1923, the hotel entertained two large conventions, one of which was that of the North Carolina Medical Society (R. 24), and that while those conventions were in progress there were days when more than one hundred and eighty guests were registered (R. 24). Furthermore there is nothing in the record to show that anyone failed to come to the appellant's hotel or left it because of its previous use as a hospital. (R. 41.)

Perhaps the most significant fact bearing upon the appellant's contention that the War Department's use of the property caused it great damage, is the fact that when the War Department ceased to occupy the property experts of the Treasury Department, "after a careful and exhaustive investigation and examination," found its value to be $888,000 (R. 31), $73,000 more than the property cost. The appellant was willing to sell the property to the Treasury Department at that price, but it now claims that at the expiration of the War Department's lease the market value of its property had been diminished by $600,000, its rental value by $448,000, and that it had sustained a total damage of $825,000, as the result of the War Department's use of the property.

It is doubtful if any claim of less merit has ever been presented to this Court. In support of it the

appellant has emphasized the cases of *Hersey* v. *Chapin*, 162 Mass. 176 and *Delano* v. *Smith*, 206 Mass. 365. It is unnecessary to add to the Court of Claims' discussion of the inapplicability of those cases to this case.

CONCLUSION

The motion to remand should be denied because the Court of Claims has found all ultimate facts necessary for a decision of the case and the judgment of the Court of Claims should be affirmed because the appellant has failed to prove either that the War Department violated the restrictive covenant, or that it suffered any damage or the extent of the damage which it suffered by reason of the alleged breach.

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